United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 2003

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Cobalt Truck Equipment
Case 27-CA-18580

506-0170
506-2067
506-2083
506-4067-8700

This Section 8(a)(1) case was submitted for advice on whether the Employer unlawfully discharged the Charging Party for attempting to organize a walkout to force the Employer to transfer a second employee for reporting employee theft, where the reporting employee was complying with a work rule requiring employees to not "withhold important information."

We conclude that the Employer lawfully discharged the Charging Party because he was not engaged in protected activity because (1) he did not protest the "important information" rule itself; (2) his attempt to protest the reporting employee's compliance with that rule was not tantamount to protesting the rule; and (3) we would not argue that the attempted protest constituted protected activity where the protest effectively would have required the employee to commit insubordination, jeopardizing his own job, solely to protect the misconduct of another employee.

FACTS

Cobalt Truck Equipment is a non-union employer engaged in the sale of trucks and installation of truck equipment. The Employer maintains an employee manual which prohibits theft and requires employees to obtain prior authorization before removing company property, including scrap metal. The employee manual also contains a rule against "withholding important information" under the heading of "actions which may lead to oral or written warnings."

On March 24, 2003, employees Bratton and Causton were leaving the shop at the end of the workday. Causton was carrying a piece of scrap metal. Bratton was carrying Causton's thermos, freeing Causton to carry the metal. The following day, Service Manager Hansen questioned Bratton about the scrap metal incident. Bratton denied any

knowledge of a theft. According to Bratton, employee Yost had been the only other person in the shop on the previous day. Bratton thus concluded that Yost had reported the scrap metal theft to Hansen. Bratton phoned other shop employees that evening and the employees agreed to meet the next day to discuss demanding the transfer of Yost out of the shop. The employees also agreed to discuss staging a walkout to force Yost's transfer.

The next day, Hansen learned of the planned employee meeting and potential walkout. No meeting was held, and the walkout never materialized. Instead, Causton and Bratton were summoned to General Manager Duncan's office for a meeting also attended by Hansen. Causton admitted taking the scrap metal; he was escorted out of the building and fired the next day. While Causton was escorted out of the building, Bratton and Hansen engaged in a heated conversation about Yost and the threatened walkout. Bratton was sent home and fired the next day.

Bratton filed a claim for unemployment benefits. Responding to a request for information from the Idaho Department of Labor (DOL), Hansen wrote that Bratton had been fired for attempting to organize a walkout. During a teleconference with DOL, Hansen iterated that Bratton was fired primarily for attempting to organize a walkout. On May 16 the DOL found that Bratton was discharged for the misconduct of attempting to organize a walkout.[1] The Region has found that the Employer discharged Charging Party Bratton for attempting to organize a walkout to protest Yost's reporting of theft.

ACTION

We conclude, in agreement with the Region, that the charge should be dismissed, absent withdrawal, because Bratton was not engaged in protected activity when he attempted to organize a walkout in protest of Yost's reporting of employee theft.

The Employer maintains that its rule against "withholding important information" imposes an affirmative duty on employees to report employee misconduct, in this case theft. A reasonable employee would conclude that such a reporting duty exists, and Yost thus could have reasonably believed that he would have been subject to discipline if he

[1] On July 3, the Industrial Commission of Idaho upheld this finding.

had not reported the theft. Bratton therefore was discharged, in effect, for attempting to organize a walkout in protest of Yost's compliance with the rule.

We first conclude that the "withholding important information" rule is lawful and valid. A work rule is unlawful if employees could reasonably read the rule to apply to and interfere with protected Section 7 activity.[2] There is no evidence that the Employer has ever applied the "important information" rule to the reporting of Section 7 activity. Moreover, the rule is listed among many other rules dealing only with work misconduct, e.g., excessive absence or tardiness, disturbing or disrupting employee work schedules, ineffective or poor job performance, etc. We note in particular that the rule immediately preceding the "important information" rule concerns a "failure to report injury." We therefore conclude that employees would reasonably read the "important information" rule, in context, to apply only to important workplace information and not to Section 7 activity.

Further, to the extent that the rule requires the reporting of employee misconduct including theft, the rule addresses a legitimate business concern. For example, an employer may discipline employees who do not cooperate with an employment investigation.[3] In sum, we find the rule requiring the reporting of "important information" to be a lawful, valid rule.

We next conclude that, even though the rule is lawful and valid, Bratton arguably would have engaged in protected activity if he had attempted to organize a walkout to protest the rule itself. Employees engage in protected activity when they walk out in protest of terms and conditions of employment.[4] The Employer's rule arguably is a term or condition of employment for two reasons. First, employee violations of the rule can result in discipline.[5] Second, employee compliance with the rule requires employees

---

[2] Lafayette Park Hotel, 326 NLRB 824 (1998).

[3] See, e.g. Service Technology Corp., 196 NLRB 845, 847 (1972).

[4] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

[5] Southern Florida Hotel & Motel Assn.,245 NLRB 561, 567 (1979): "[w]ork rules, particularly those where penalties are prescribed for their violation, are . . . terms and conditions of employment...."

to monitor their fellow employees for possible misconduct. The Board has held that employer use of cameras to monitor employee misconduct "vitally affects" employment and thus is a term or condition of employment.[6] The rule here serves the same purpose as monitoring cameras and thus arguably also "vitally affects" employment terms. Bratton's protesting of the rule itself, therefore, arguably would have constituted protected activity.

Bratton, however, was not protesting the rule; rather he attempted to protest Yost's reporting of employee theft in apparent compliance with the rule. We conclude that protesting an employee's compliance with a work rule is not tantamount to protesting the rule itself.

Promulgating and enforcing work rules is conduct on the part of an employer. Complying with work rules is conduct on the part of an employee. Protesting compliance with work rules thus protests employee conduct, not employer conduct. Moreover, the Board clearly distinguishes between employee protest of a work rule, which is protected, and employee disobedience of a work rule, which is unprotected.[7] We therefore conclude that protesting employee compliance with a rule is not the same as protesting the rule itself.

Finally, we would not argue that protesting employee compliance with a valid work rule encompasses protected, Section 7 activity. Research uncovered no cases holding that protesting employee compliance with a work rule constitutes protected activity,[8] and we would not make that argument where the result seeks employee insubordination and undermines the work rule. Bratton's attempted walkout in effect protested Yost's refusal to violate the rule and commit insubordination, jeopardizing his own job, solely to protect the misconduct of another employee. We can find no

---

[6] Colgate-Palmolive Co., 323 NLRB 515 (1997).

[7] Bird Engineering, 270 NLRB 1415 (1984) (employer lawfully discharged employees because they chose to simply ignore new "closed campus" rule rather than choosing to protest it.)

[8] We agree with the Region that R&S Steel Corp., 222 NLRB 69 (1976), does not apply here because Bratton was protesting compliance with a work rule, and was not protesting employer favoritism. Similarly, Harger Mine #1, 230 NLRB 461 (1977) (walkout did not protest a work rule and employee conduct, but rather protested an employer work assignment) is inapposite because this case does not involve an employer work assignment.

rationale for protecting an employee protest seeking that purpose. In addition, the "important information" rule is effective only through employee compliance. Protesting employee compliance, therefore, not only sanctions employee insubordination but also eviscerates a legitimate rule. Finally, employees do not have the right to pick and choose which rules they will obey.[9] If Bratton and his fellow employees wanted to engage in a protected protest of the rule, the proper course of action would have been to accept Yost's compliance with the rule and protest the rule itself.

Accordingly, we conclude that the charge should be dismissed, absent withdrawal.

B.J.K.

[9] See e.g., Specialized Distribution Management, 318 NLRB 158, 161 (1995): "The general rule . . . is: 'Obey now; grieve later.' These employees did not follow that well-ingrained procedure and their misconduct . . . can reasonably be seen as . . . insubordination."